Supreme Court of Florida

FRIDAY, OCTOBER 22, 1999

LISA BROWN,	*	
	*	
Petitioner,	*	
	*	
vs.	*	CASE NO. 94,528
	*	
STATE OF FLORIDA,	*	
	*	
Respondent.	*	
	*	
* * * * * * * * * * * * * * * * * * * *	*	

Petitioner's Motion to Adopt Petitioner Falkenstein's Initial and Reply Briefs and Arguments filed in Case No. 94,527 is hereby granted.

A True Copy

TEST:

Debbie Causseaux

Debbie Causseaux
Acting Clerk, Supreme Court

BHP
cc: Mr. Bradley R. Stark
Ms. Sarah Mayer
Mr. Edward M. Kay
Ms. Celia A. Terenzio
Ms. Debra A. Rescigno

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LISA BROWN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____/

Case No. 94,528

District Court of Appeal,
4th District - No. 97-3931

MOTION TO ADOPT PETITIONER FALKENSTEIN'S INITIAL AND REPLY BRIEFS AND ARGUMENTS

Petitioner LISA BROWN files this Motion to Adopt Petitioner Stephen Falkenstein's Initial and Reply Briefs and Arguments and states as follows:

1. On April 12, 1999, this Court accepted jurisdiction to review the lower appellate court decision in this case, based on certification of conflict with decsions of other appellate courts. State v. Falkenstein, 720 So.2d 1143 (Fla. 4th DCA 1998).

2. Petitioners Lisa Brown and Stephen Falkenstein (former co-petitioner/co-appellee) filed their respective Initial and Reply Briefs with this Court.

3. Prior to a decision by this Court and for personal reasons, Petitioner Stephen Falkenstein decided to change his plea in this case. On or about August 27, 1999, the trial court accepted Falkenstein's plea.

4. On October 7, 1999, this Court granted Falkenstein's Notice of Voluntary Dismissal as to Falkenstein and dismissed Supreme Court Case No. 94,527.

5. Petitioner Brown wishes to adopt the Initial and Reply Briefs and arguments of Petitioner Falkenstein.

6. We have spoken to opposing counsel, Sarah Mayer, Esq., and she has no objection to the granting of this motion.

Bradley R. Stark • SUITE 601 • 2601 SOUTH BAYSHORE DRIVE • MIAMI, FLORIDA 33133 • TELEPHONE (305) 854-9666

WHEREFORE, Petitioner respectfully requests that this Honorable Court allow petitioner Brown to adopt the Initial and Reply Briefs and arguments of her former co-petitioner and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

Bradley R. Stark, Esq.
Florida Bar No: 373834
Attorney for Petitioner BROWN
Law Offices Bradley R. Stark
2601 South Bayshore Drive, Suite 601
Miami, Florida 33133
305-854-9666

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 12 day of October, 1999 to Sarah Mayer, Esquire, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299; and to Edward M. Kay, P.A., 633 SE Third Avenue, Suite 4F, Fort Lauderdale, Florida 33301.

BRADLEY R. STARK

file

IN THE
SUPREME COURT OF FLORIDA

Nos. 94,527

STEPHEN FALKENSTEIN,
Petitioner

v.

STATE OF FLORIDA,
Respondent

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE FOURTH
DISTRICT COURT OF APPEAL

AMENDED INITIAL BRIEF OF PETITIONER STEPHEN FALKENSTEIN

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FLORIDA RULES OF COURT

MISCELLANEOUS

STATEMENT OF THE CASE AND OF THE FACTS

Appellant was charged with trafficking in hydrocodone under F.S. 893.135(1)(c) 1 (A-1). The section of the trafficking statute provides as follows:

> "Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of four grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphine, or any salt, derivative, isomer or any salt of an isomer thereof, including heroin, as described in 839.03(1)(b) or (2)(a), or four grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as 'trafficking in illegal drugs'."

F.S. 839.03(1)(b) or (2)(a) refers to Schedule I and Schedule II drugs.

The hydrocodone was contained in commercially manufactured tablets containing 7.5 milligrams of hydrocodone per dosage unit (A-4) Hydrocodone is listed in another schedule, Schedule III, when the dosage is not more than 300 milligrams of hydrocodone per 100 milliliters or no more than 15 milligrams per dosage unit with recognized therapeutic amounts of one or more active ingredients which are not controlled substances. F.S. 893.03(3)(c)4. The dosage in this case was low enough to meet the hydrocodone criteria of "Schedule III." F.S. 893.03(3)(c). Accordingly, it was excepted out of Schedule II.

Appellant filed a motion to dismiss the trafficking information. (A-1) Appellant argued that possession of a Schedule III drug is a third degree felony, and is not

governed by the trafficking statute. Appellant also argued that the applicable statutory language, being susceptible to differing constructions must be construed in favor of the accused.

The trial court agreed with Appellant's position and the rationale of the First District Court of Appeal in *State v. Holland*, 689 So.2d. 1268 (Fla. 1st DCA 1997), and dismissed the trafficking information (A-21).

The State appealed the dismissal (A) and the Fourth District Court of Appeal reversed (A). In so doing, the appellate court certified conflict with the First District's holding in *State v. Holland* and the Second District's holding in *State v. Perry*, 716 So.2d. 327 (Fla. 2d DCA 1998). Appellant appeals the appellate court decision pursuant to Fla.R.App.P. 9.030(2)(vi).

JURISDICTION

The Fourth District opinion conflicts with the opinions of the First and Second District Courts of Appeal. The other districts have ruled that when the dosage of hydrocodone falls under Schedule III, the amount of the controlled substance per dosage unit governs, and not the aggregate weight. Accordingly, those districts have ruled that the trafficking statute is not available with regard to the concentrations of hydrocodone alleged in this case.

SUMMARY OF ARGUMENT

F.S. 893.03 breaks down various controlled substances into Schedules numbered I through V. Hydrocodone is listed in Schedule II, but only to the extent that is not listed in another Schedule. F.S. 893.03(2)(a)j. Particular concentrations of hydrocodone are listed in Schedule III F.S. 893.03(3)(c)4. These categories contain no aggregate weight limitation. As the concentration of hydrocodone involved in this case is specifically listed as a Schedule III drug. It cannot also be a Schedule II drug under the terms of the statute. The provisions of the cited trafficking statute, including the "mixture" language, apply only to Schedule I and II substances and not to commercially manufactured tablets with ascertainable concentrations.

Accordingly, the information for trafficking was properly dismissed.

Alternatively, the relevant statutes are at least subject to differing constructions. Under F.S. 775.021, these statutes must be construed most favorably to the accused. Under the most favorable construction, the controlled substance involved here is only a Schedule III substance and is not included within the parameters of F.S. 893.135(1)(c)1.

ARGUMENT

A. THE TRIAL COURT PROPERLY DISMISSED COUNT I AS THE DOSAGE OF HYDROCODONE INVOLVED IS A SCHEDULE III CONTROLLED SUBSTANCE.

The trial court properly dismissed Count I under the rationale of *State v. Holland*, 689 So.2d. 1268 (Fla. 1st DCA 1997). The dosage of hydrocodone allegedly involved here is specifically listed in Schedule III. F.S. 893.03(3)(c)4. That section contains no limitation as to aggregate amount or weight. Although hydrocodone is also listed in Schedule II, it can only be a Schedule II substance if it is not listed in another schedule. F.S. 893.03(2)(a). Although Schedule III also contains the same exception language, (F.S. 893.03(3)(c)), both the Schedule II and Schedule III provisions can be given meaning. Schedule II clearly applies to higher concentrations while Schedule III pertains to lower concentrations without limitation to aggregate amount. Had the Legislature desired to limit the Schedule III hydrocodone to a certain aggregate amount or weight, it could have done so. Clearly, there is no such provision in F.S. 893.03(3)(a)4.

The trafficking statute does not supply this limitation and does not change or "re-include" the dosage involved here as a Schedule II substance. F.S. 893.135(1)(c)1 pertains to a list of substances including hydrocodone, "as described in S. 893.03(1(b) or (2)(a), or four grams or more of any mixture containing any such substance."

(Emphasis added) As the concentration here is not described in s. 893.03(1)(b)or (2)(a), it is not controlled by this section. The "mixture" provision refers to "such substance". The phrase "such substance" refers back to the substances as described in Schedules I and II. Accordingly, by the terms of the statute, a mixture of hydrocodone, even in excess of four grams, is only included if the concentrations described in Schedules I or II. Here, the concentration is not included in those schedules.

The State cited cases involving mixtures of cocaine. These cases, however, do not apply to commercially manufactured substances which have certain and ascertainable dosages. The substances in those cases were not listed in Schedule III. Those cases involved specific cocaine trafficking statutes. With regard to hydrocodone, however, the legislature did not provide for all mixtures to fall within the four gram requirement, but only those mixtures of hydrocodone included in Schedules I and II. To be included in the trafficking statute, the concentration would simply have to be higher than that alleged to be involved here. This interpretation gives meaning to all of the statutory provisions.

This interpretation does not leave a defendant free from prosecution for possession of this particular concentration. It is simply a third degree felony and not a first degree felony.

The Fourth District Court of Appeals first decided that low concentrations of

hydrocodone were included in the trafficking statute if the aggregate weight requirement was met in *State v. Hayes*, 720 So.2d. 1095 (Fla. 4th DCA 1998). In reaching this conclusion, the appellate court relied on the decision in *Chapman v. United States*, 500 U.S. 453 (1991) superseded by statute on other grounds as stated in *United States v. Turner*, 59 F.3d. 481 (4th Cir. 1995). The issue in *Chapman*, however, was whether or not LSD contained in blotter paper constituted a "mixture" such that the aggregate weight of the LSD and the blotter paper was to be used in determining sentencing pursuant to the "mixture" language in the sentencing statute. That case did not involve commercially manufactured substances.

Additionally, that case did not involve a substance which when commercially prepared in a low concentration was listed on a different schedule of substances not referenced in the sentencing statute being utilized. The crucial issue argued in *Chapman* revolved around whether or not the LSD in the blotter paper constituted a mixture.

The issue here, on the other hand, is whether or not the low concentrations of hydrocodone which meet the Schedule III requirements and are thereby excepted out of Schedule II, are included in the trafficking statute, which statute refers to all of the substances listed as being described in Schedules I and II. Accordingly, the *Chapman* case does not address the central issue in this case.

Here, all statutory provisions can be given meaning, including the language "as described in s. 893.03(1)(b) or (2)(a)," in the trafficking statute, the exception language in F.S. 893.03(2)(a), and the inclusion of low concentrations of hydrocodone in F.S. 893.03(3)(c), by the construction given the statutes by the trial court.

B. ALTERNATIVELY, THE TRIAL COURT PROPERLY DISMISSED COUNT I AS THE STATUTES INVOLVED ARE SUSCEPTIBLE OF DIFFERING CONSTRUCTIONS AND MUST BE CONSTRUED MOST FAVORABLY TO THE ACCUSED.

At least, the statutes involved here are susceptible of differing constructions. Although the Court in *State v. Baxley*, 734 So.2d. 831 (Fla. 5th DCA 1997) *rev.den.* 694 So.2d 737 (1997) found that Schedule III hydrocodone applies to only small aggregate amounts of hydrocodone, that statute simply does not so provide. An equally, if not more, viable interpretation is that the lower concentrations in any aggregate amount will always be a Schedule III substance, and the trafficking statute does not change that. An equally if not more, logical interpretation is that the trafficking statute only applies to hydrocodone if it is described in Schedule II, and the concentrations alleged here are <u>not</u> described in Schedule I as they are specifically <u>excepted</u>.

An equally, if not more, grammatically correct interpretation of the trafficking statute is that the mixtures weighing more than four grams in the aggregate refer only

to substances as described in Schedules I and II, and that the statute does not refer to commercially manufactured tablets when the amount of the controlled substance per tablet is readily ascertainable and accordingly included in Schedule III.

The applicable trafficking statute did not always include hydrocodone. Prior to hydrocodone being included, that statute applied to morphine, opium, or any salt, isomer, or mixture of an isomer thereby including heroin, as described in s. 893.03(1)(b) or (2)(a) or four grams or more of any mixture containing any such substance but less than 30 kilograms of such substance or mixture. § 893.135 Fla.Stat. (1993) (emphasis added) The substances included in the original trafficking statute were all Schedule I or Schedule II drugs. Therefore, there was no ambiguity or issue then as to the inclusion of lower concentrations in mixture of those substances within its terms.

In 1995, the statute was amended by simply adding the words oxycodone, hydrocodone, and hydromorphine after the word opium, but before the modifier "as described in s. 893.03(1)(b)or (2)(a)." Ch. 95-415 sec. 5 at 3417, Laws of Fla. No further provisions were added to include those mixtures of hydrocodone which were described in Schedule III, as opposed to Schedule I or II.

The Staff Analysis prepared by the House Committee on Health Care regarding the amendment to the trafficking statute to include hydrocodone, does not make any

reference to the fact that the original substances included therein were all Schedule I or II drugs. (A-25) Nor does it make reference to the "as described in" language of the statute or the fact that certain concentrations of hydrocodone are Schedule III drugs. Although the intent, as stated, is to include hydrocodone in the statute governing trafficking, there simply is no consideration given to the specific language of the trafficking statute or the ambiguity created by that language, and the fact that certain concentrations of hydrocodone appear on Schedule III. Certainly, there was no apparent intent to "re-include" low concentrations of hydrocodone in Schedule II based on the aggregate weight.

Accordingly, at the least, an ambiguity was created by the failure to address the fact that some mixtures of hydrocodone are not Schedule I or II substances. Therefore, the rule of construction supplied in F.S. 775.021(1) must be applied, and the interpretation most favorable to the accused must be implemented. The ruling in *State v. Holland* should be followed. The trafficking count was properly dismissed.

CONCLUSION

WHEREFORE, Appellee respectfully requests that the opinion of the Fourth District Court of Appeal be reversed and that the trial court's dismissal of Count I be reinstated.

RESPECTFULLY SUBMITTED

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Catherine Ruffles 0288 72
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January 1999 a copy of the foregoing was furnished by United States Mail to:

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for Catherine Rafferty 34887.
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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the foregoing Amended Initial Brief of Petitioner Stephen Falkenstein was printed in New Times Roman 14 Font Size.

for Catherine Rafferty 34887
Edward M. Kay/ 099769

IN THE
SUPREME COURT OF FLORIDA

Nos. 94,527
94,528

STEPHEN FALKENSTEIN,
Petitioner

v.

STATE OF FLORIDA,
Respondent

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE FOURTH
DISTRICT COURT OF APPEAL

APPENDIX TO
INITIAL BRIEF OF PETITIONER STEPHEN FALKENSTEIN

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APPENDIX TABLE OF CONTENTS

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA	**INFORMATION FOR**
VS.	
LISA BROWN	I. TRAFFICKING IN HYDROCODONE
STEPHEN FALKENSTEIN	II. GRAND THEFT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that LISA BROWN and STEPHEN FALKENSTEIN on the 30th day of May, A.D. 1996, in the County and State aforesaid, did then and there unlawfully and knowingly have in their actual or constructive possession a controlled substance to-wit: Hydrocodone, or a mixture containing Hydrocodone, in an amount of twenty-eight (28) grams or more, but less than thirty (30) kilograms, contrary to F.S. 893.135(1)(c)1c and F.S. 893.03(2)(a)1j,

Count II

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that LISA BROWN on the 30th day of May, A.D. 1996, in the County and State aforesaid, did then and there unlawfully and knowingly obtain or endeavor to obtain the property of Medchoice, to-wit: Vicadin, of the value of three hundred dollars ($300.00) or more, but less than twenty thousand dollars ($20,000.00), with said property being more particularly of a value between five thousand ($5,000.00) or more, but less than ten thousand ($10,000.00), with the intent to either temporarily or permanently deprive Medchoice of the right to the property or a benefit therefrom, or to appropriate the property to her own use or the use of any person not entitled thereto, contrary to F.S. 812.014(1)(a), F.S. 812.014(1)(b), and F.S. 812.014(2)(c)1.,

STATE OF FLORIDA vs. **LISA BROWN** **INFORMATION, PAGE 2**
W/F, 12-18-71
SS#272-60-5748
STEPHEN FALKENSTEIN
W/M, 5-23-71
SS#261-81-8996

COUNTY OF FLORIDA
STATE OF FLORIDA

Personally appeared before me JOHN J. GALLAGHER, duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn, certifies and says that testimony has been received under oath from the material witness or witnesses for the offense(s), and the allegations as set forth in the foregoing Information would constitute the offense(s) charged, and that this prosecution is instituted in good faith.

John J. Gallagher
Assistant State Attorney, 17th Judicial Circuit Of Florida

SWORN TO AND SUBSCRIBED before me this 20 day of June, A.D. 1996

A TRUE COPY
Circuit Court Seal

ROBERT E. LOCKWOOD
Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By Riley Brady
Deputy Clerk

To the within Information, Defendant pleaded _____.

ROBERT E. LOCKWOOD
Clerk of the Circuit Court, 17th Judicial Circuit,
Broward County, Florida

By _____
Deputy Clerk

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

Case No.:96-009875-CF-10-A

Judge: SCHAPIRO

STATE OF FLORIDA,

Plaintiff,

vs.

STEPHEN FALKENSTEIN,

Defendant. /

MOTION TO DISMISS RE: TRAFFICKING COUNT,
AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Defendant, STEPHEN FALKENSTEIN (Falkenstein), by and through undersigned counsel, pursuant to Fla.R.Crim. P. 3.190[1], the Due Process and Equal Protection Clauses of the United States and Florida Constitutions, and the Eighth Amendment of the United States Constitution, and moves this Court to dismiss Count I and grant the State Attorney leave to refile the offense as unlawful possession of a Schedule

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[1] In *State v. Globe Communications Corp.*, 622 So.2d 1066 (Fla. 4th DCA 1993), the court declared *Florida Statute* 794.03, which made it a crime to identify the victim of a sexual battery unconstitutional both on its face and as applied. The State objected that the defendant's motion to dismiss was procedurally barred, because it was a mixed question of law and fact which did not conform to Fla.R.Crim.P. 3.190(c)(4). The court noted that a motion challenging the constitutionality of the statute, on its face, is a question of law; and a motion attacking the constitutionality of a statute, as applied, is a mixed question of law and fact. The court ruled, "(m)otions made under Rule 3.190, which do not fall into the subsection (c)(4) category, may raise factual issues and it is appropriate for the court to resolve them in order to decide whether (the statute) is constitutional as applied to the facts in this case. Based on this reasoning, it is proper for this Court to resolve issues of fact, or make findings of fact in determining this motion. For purposes of this motion, it is undisputed that the Defendant possessed 1500 Vicodin tablets, which were commercially manufactured pharmaceutical drugs. The tablets were removed from the Defendant's place of business, a licensed pharmaceutical supply house.

III controlled substance; or, in the alternative, to reduce the charge to the lesser included offense of trafficking in a controlled substance less than 14 grams; or, in the alternative, to declare the penalties for the offense unconstitutional. As grounds therefor, the Defendant states:

1. Count I charges the Defendant with trafficking in hydrocodone over 28 grams but less than 30 kilograms, which is punishable by a mandatory minimum sentence of 25 years, and a mandatory fine of $500,000.00. The State charges that the Defendant was in possession of 1500 Vicodin tablets.[2] Vicodin is an FDA approved prescription drug, which is lawfully manufactured and distributed in Florida and the United States, and has a recognized medical use. According to the *Physicians Desk Reference* and publications of the Federal Drug Enforcement Administration (DEA), each table contains 7.5 mg of hydrocodone and 750 mg of acetaminophen, a non-prescription, over-the-counter medicine (Tylenol). Each tablet contains less than 300 milligrams of hydrocodone per 100 milliliters, and not more than 15 milligrams per dosage unit, and a recognized therapeutic amount of acetaminophen, a non-controlled substance. The total or aggregate amount of hydrocodone in 1500 tablets is 11,250 mg, or 11.25 grams (i.e., 1500 tablets x 7.5 mg of hydrocodone per tablet = 11,250 mg or 11.25 grams of hydrocodone).

2. The Broward County Sheriff's Office forensic chemist analyzed the tablets as follows. When given tablets to analyze, first he conducted a visual examination. All the tablets appeared to be genuine, commercially manufactured pharmaceutical drugs. The

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[2] The police evidence receipt lists 1500 tablets.

tablets did not appear to be bootleg, homemade or clandestinely produced copycat drugs. Given the tablets appeared to be genuine, commercially manufactured tablets, he compared the "markings" or "writings" on the tablets with a manual published by the DEA. The DEA manual gives a description of the tablet, and gives the name of the pharmaceutical company that manufactured the tablet. **The manual states the active ingredients contained in the tablet and the amount of each ingredient.** A Vicodin tablet contains 7.5 mg of hydrocodone and 750 mg of acetaminophen. After reading in the DEA manual what the tablet contained, the chemist structured his test to detect the substance listed in the DEA manual. Because the tablet had a Vicodin marking, he tested for hydrocodone. Because all the tablets appeared to be identical, genuine, commercially manufactured tablets, it was only necessary to test one tablet. The weight listed on the laboratory report was derived by weighing the pills; in other words, the weight listed in the laboratory report is the gross weight of the tablets, including the non-controlled substance, acetaminophen. Even though the chemist knew the exact amount of weight of the controlled substance, the gross weight of the tablets, including non-controlled substances, was included in the weight calculation. The State Attorney's Office based its decision as to what degree of the offense to charge based on the gross weight of the tablets, even though the exact weight of the controlled substance was known, or readily ascertainable. (emphasis added)

3. Given that each tablet contains not more than 300 milligrams of hydrocodone per 100 milliliters, and not more than 15 milligrams per dosage unit, and a therapeutic amount of acetaminophen, the tablets are a Schedule III substance regulated by s. 893.03

(3)(c)(3) or (4), Fla. Stat. (1993). Thus, any unlawful possession of the tablets is a third degree felony, regulated by s. 893.13(1)(a)(2), Fla.Stat. (1993).

4. In the alternative, given the aggregate or total actual amount of the controlled substance possessed is less than 14 grams, the charge should be reduced to the lesser included offense of trafficking in a controlled substance less than 14 grams.

5. In the alternative, the punishments are unconstitutional. Regarding Count I, the punishment does not fit the crime. The penalties imposed are excessive, and/or the punishments are not rationally related to the criminal act. Count I charges the defendant with possession of 1500 tablets of a FDA approved prescription drug. The only crimes in Florida with a more sever mandatory minimum punishment are violent crimes, or crimes against persons. First degree murder is punishable by death or life imprisonment without parole. Sexual batter on a minor child is punishable by life imprisonment. A mandatory minimum prison term of 25 years is arbitrary and capricious and/or grossly disproportionate when compared to the punishment for serious violent crimes which pose a greater threat to the health, safety, and welfare of society. There is **no** mandatory minimum jail term for these offenses: Second Degree Murder, Manslaughter, Sexual Battery, Strong Armed Robbery, Arson, Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnaping, or Discharging a Bomb Resulting in Serious Injury.

6. Regarding Count I, a mandatory fine of $500,000.00 is arbitrary and capricious, and/or grossly disproportionate and excessive. Consider the punishment for the following violent crimes which pose a greater threat to the health, safety, and welfare

of society. There is **no** mandatory fine for these offenses: Second Degree Murder, Manslaughter, Sexual battery, Strong Armed Robbery, Arson, Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnaping, or Discharging a Bomb Resulting in Serious Injury. A fine must be rationally related to the offense, and if a fine is excessive or grossly disproportionate, then it is unconstitutional.

Memorandum of Law

Point I

The tablets are a Schedule III substance such that possession of it is a third degree felony, regulated by 893.13(1)(a)(2), Fla.Stat. (1993).

Falkenstein raises the same argument raised in *State v. Holland*, 689 So.2d 1268 (Fla. 1st DCA 1997). Falkenstein is charged with trafficking in hydrocodone:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any slat, derivative, isomer, or salt of any isomer thereof, including heroin, as described in s.893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs". s. 893.135(1)(c)(1), Fla.Stat. (1993)

In contrast, s.893.03(3), Fla. Stat., titled "SCHEDULE III," provides:

> A substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II, and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. The following substances are controlled in Schedule III:

* * *

> (c) unless specifically exempted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited qualities of any of the following controlled substances or any salts thereof:
>
> * * *
>
> 3. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid or opium.
>
> 4. Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, **with recognized therapeutic amounts of one or more active ingredients which are not controlled substances**, (emphasis added)

In the case *sub judice*, each tablet contains 7.5 mg of hydrocodone and 750 mg of acetaminophen, which is a recognized therapeutic amount of a non-prescription drug. When Falkenstein was arrested, the police **correctly** charged him with possession of hydrocodone and acetaminophen, a Schedule III substance in violation of s. 893.13. Later, the State Atttorney's Office increased the severity of the charge to trafficking in hydrocodone.

Two rules of statutory construction apply in analyzing the interrelationship between the offense of trafficking in hydrocodone and the offense of unlawful possession of a Schedule III substance. First, penal statutes are strictly construed in favor of the defendant. *Carawan v. State*, 515 So.2d 161 (Fla. 1987). This rule of construction was codified by the Legislature:

> The provisions of this code and offenses defined by other statutes shall be strictly construed, when the language is

> susceptible of difference constructions, it shall be construed most favorably to the accused. s. 775.02(1) Fla.Stat. (1985)

Second, a specific statute controls over a more general statute.

It is undisputed that the 1500 tablets do not contain more than 28 grams of the actual substance hydrocodone. The total or aggregate amount of hydrocodone in 1500 tablets is 11,250 mg or 11.25 grams (i.e., 1500 tablets x 7.5 mg of hydrocodone per tablet = 11,250 mg or 11.25 grams of hydrocodone). In order to charge the offense of trafficking, the State Attorney has derived the weight from the gross weight of the tablets, including the non-controlled substance acetaminophen. The State Attorney justifies its method of calculating the weight by that portion of the trafficking statute which contains the language, "...4 grams or more of **any mixture containing any such substance**." The State Attorney opines that the "mixture" of hydrocodone and acetaminophen weighs over 28 grams; hence the trafficking statute applies. (emphasis added)

The State Attorney's "mixture" calculation ignores the clear language of s. 893.03(3)(c)(4) Fla. Stat. (1993), which defines a Schedule III substance as:

> Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, **with recognized therapeutic amounts of one or more active ingredients which are not controlled substances**. (emphasis added)

The aforesaid language clearly recognizes that the hydrocodone will be "mixed" with one or more substances. If the hydrocodone is "mixed" with a therapeutic amount of one or more active ingredients which is not a controlled substance, then it is a Schedule III substance. In our case, the hydrocodone is "mixed" with a therapeutic amount (i.e., 750

mg) of acetaminophen, which is an over-the-counter pain medication. Thus, when hydrocodone within the prescribed amounts is found in a tablet containing acetaminophen, it is a pharmaceutical drug within the definition of Schedule III. Consequently, any unlawful possession of such tablets is a third degree felony, regulated by s.893.13(1)(a)(2), Fla. Stat. (1993).

The offense of trafficking in hydrocodone must be dismissed. The State Attorney should be given fifteen (15) days to amend the Information to charge Falkenstein with the offense of unlawful possession of a Schedule III substance in violation of s. 893.03(3)(c)(4), and s. 893.13(1)(a)(2), Fla. Stat. (1993).

Point II

When the controlled substance is contained in a commercially manufactured pharmaceutical tablet and the amount of the controlled substance is known or readily ascertainable, the actual weight of the controlled substance determines the applicable penalty.

The Defendant asserts that the Trafficking Statute must be strictly construed in his favor. Thus, when the specific amount of the controlled substance is known, or readily ascertainable, the actual weight of the controlled substance determines punishment. The rules of statutory construction require penal statutes to be strictly construed. *State v. Camp*, 596 So.2d 1055 (Fla. 1992). Further, when a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. *Scates v. State*, 603 So.2d 504 (Fla. 1992). This principle has been codified by the Florida Legislature. Section 775.021(1), Fl.Stat. (1989), provides, "(t)he provisions of this code and offenses defined by other statutes shall be strictly construed; **when the language is susceptible**

of differing constructions, it shall be construed most favorably to the accused." (emphasis added).

The Defendant is charged with violating Subsection (c) of the Trafficking Statute [s.893.135(c)(1), Fla.State. (1995)]. Subsection (c) is worded in the alternative. First, it provides, "(a)ny person...who is knowingly in actual or constructive possession of 4 grams or more of any...hydrocodone,...or any salt, derivative, isomer, or salt of an isomer thereof, but less than 30 kilograms of such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." (emphasis added)

In our case, the Defendant is charged with being in actual or constructive possession of hydrocodone. According to Subsection (c), if the Defendant was in possession of 4 grams or more of the actual substance, then he has committed the offense of trafficking in illegal drugs. In the alternative, the State Attorney alleges that if the Defendant was in possession of 4 grams or more of any mixture containing the controlled substance, then he has committed the offense of trafficking in illegal drugs.

The questions presented are (1) When does the "mixture" provision apply? and (2) is it applicable given the facts of this case? The Defendant is charged with trafficking in hydrocodone by being in possession of 1500 Vicodin tablets, which are a prescription drug, with a recognized medical purpose, manufactured by a licensed pharmaceutical firm under the strict supervision of the FDA.[3]

The "mixture" provision is appropriate in cases involving street drugs, such as

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[3] The FDA is the United States government Food and Drug Administration.

cocaine or heroin, which are not manufactured under government supervision, and which are not manufactured under conditions with strict quality and quantity control. Additionally, "street drugs" are purposely "cut" or "mixed" or "diluted" to increase the amount of the product to be sold, and thereby increase the value. For example, pure cocaine is "mixed" to make more of the substance, to increase the amount of the substance for distribution, which means there is more to sell. The opposite is true of commercially manufactured pharmaceuticals, such as Vicodin, which are sold in their pure, unadulterated form. Falkenstein agrees the government should not be required to perform a quantitative or qualitative analysis on street drugs "mixed" by an amateur chemist.

In our case, the State Attorney, the police, and the forensic chemist opine the tablets are genuine, commercially manufactured pharmaceutical drugs. The Defendant is charged with possession of them after obtaining them from his co-defendant who worked for a pharmaceutical company. A simple visual observation of the tablets reveals they are identical to the tablets pictured in the Physician's Desk Reference, a nationally recognized authoritative source, and the tablets have the identifying "markings" as codified in the DEA publication. Given that these publications reflect the exact amount or weight of hydrocodone in each table, the exact amount of the controlled substance is known or readily ascertainable. Given that penal statutes are strictly construed in favor of the accuse, the actual weight of the hydrocodone determines the applicable penalty.

Point III

The punishment does not fit the crime.

If the Court denies the relief in Points I and II, the Defendant challenges that the

mandatory minimum sentence and mandatory fine are unconstitutional.

The mandatory minimum sentences:

Regarding Count I, the mandatory prison term as applied to the facts of this case is cruel and unusual punishment. Count I charges the Defendant with possession of 1500 Vicodin ES tablets, which is an FDA approved prescription drug. The Defendant is facing a mandatory minimum prison term of 25 years for possessing a prescription drug without a prescription. The only crimes in Florida with a more severe mandatory minimum punishment are violent crimes, or crimes against persons. First degree murder is punishable by death or life imprisonment without parole. Sexual battery on a minor child is punishable by life imprisonment. A mandatory minimum prison term of 25 years is arbitrary and capricious and/or grossly disproportionate when compared to the punishment for serious violent crimes which pase a greater threat to the health, safety, and welfare of society. There is no mandatory minimum jail term for these offenses: Second Degree Murder, Manslaughter Sexual batter, Strong Armed Robbery, Arson, Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnaping, or Discharging a Bomb Resulting in Serious Injury.

Is it proportional and rational to punish the possession of 11 grams of hydrocodone, which is a prescription substance with a recognized medical purpose more severely than killing a child or savagely beating and raping a teenage girl? A second degree murder of a child can result in a sentence of less than 25 years and a sentence which does not impose a mandatory minimum term of incarceration.

It is cruel and unusual punishment and constitutionally irrational to punish

possession of 1500 tablets of a prescription drug with a recognized medical use more severely than murder and rape. However, voiding the mandatory minimum sentence of 25 years does not mean the Defendant goes unpunished. Given the severability clause, which is standard to all legislation, the Court could impose the punishment applicable for a first degree felony as modified by the sentencing guidelines.

The mandatory fines:

The mandatory fines violate the excessive Fines Clauses and Equal Protection Clauses of the United States and Florida Constitutions. The Defendant is charged with possession of in excess of 28 grams of the controlled substance, and the State is seeking to levy a $500,000.00 fine.

The purpose of the Eighth Amendment was to limit the government's power to punish. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 106 L.Ed.2d 219, 109 S.Ct. 2909 (1989). The Cruel and Unusual Punishments Clause is concerned with punishment, and the Excessive Fines Clause limits the government's power to extract monetary payments as punishment. Id. at 265. The United States Eleventh Circuit Court of Appeal holds that the appropriate inquiry with respect to the Excessive Fines Clause is and is only a proportionality test. The Excessive Fines Clause, on it face, prohibits fines which are "excessive" - - fines that are in an amount that is just too much. The determination of excessiveness is based at least in part on whether the fine imposed is disproportionate to the crime committed. The Court must ask: Given the offense for which the accused is being punished, is the fine excessive? The core of proportionality review is a comparison of the severity of the fine with the serousness of the underlying offense.

See *U.S. v. One Parcel Property located at 427 and 429 Hall Street, Montgomery County, Alabama*, 74 F.3d 1165 (IIth Cir. 1996).

The recent case law regarding forfeitures is instructive. The excessive Fines Clause is now being applied to forfeitures derived from criminal activity. See *Austin v. U.S.*, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). In *City of Tampa Police Department v. Acosta*, 645 So2d 551 (Fla. 2nd DCA 1994), the Tampa Police Department sought the forfeiture of a 1993 Dodge Intrepid automobile used to drive to a location where the driver purchased $20.00 worth of crack cocaine. The district court, relying on the Excessive Fines Clause, affirmed the trial court's refusal to forfeit the car. See *Austin v. U.S.*, 113 S.Ct. 2801 125 L.Ed.2d 488 (1993). If the forfeiture of a $20,000.00 car used in the commission of a crime is considered too severe a monetary punishment and an excessive fine, then a $500,000.00 fine for possessing 1500 tablets of a prescription drug without a prescription must be an excessive fine.

In *U.S. v. Dean*, 87 F.3d 1212 (IIth Cir. 1996), Dean was charged with attempting to transport thousands of dollars ($140,000.00) out of the country without informing the government, in violation of 31 U.S.C. 5316(a)(1)(A) and 5322(a) and 31 D.F.R. 103.23. Dean was arrested at the West Palm Beach International Airport by U.S. Customs Service agents for failing to notify the government that he was transporting in excess of $10,000.00 out of the country, to-wit: $140,000.00. The government filed criminal charges and forfeiture action. In accord with the plea agreement he entered into with the government, Dean plead guilty to attempting to transport currency in excess of $10,000.00 out of the country and agreed to withdraw his claim to the $140,000.00. Judge Roettger, on his own

motion, declared that the forfeiture provision of the plea agreement constituted an excessive fine. Judge Roettger mitigated the forfeiture to $5,000.00 and ordered the government to return the remainder of the funds. The Eleventh Circuit relying on the *Austin* decision, affirmed Judge Roettger's ruling.

In *U.S. v. One Single Family Residence located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (IIth Cir. 1994), the government sought to forfeit a single family residence worth approximately $150,000.00. The forfeiture action resulted from the government's investigation of poker games conducted at the residence. After observing the poker games on numerous occasions, the agents served a search warrant on the residence, and seized gambling records, poker tables, poker chips, decks of cards and cash. One of the owners of the property, the husband, was charged with operating an illegal gambling operation in violation of 18 U.S.C. (1955(b). The owner of the property was convicted of all counts of conducting an illegal gambling operation. In denying the forfeiture, the Eleventh Circuit wrote:

> In Austin, the owner of real property occupied by his mobile home and autobody shop, sold two ounces of cocaine on the premises. The subsequent search of the premises revealed small amounts of marijuana and cocaine, drug paraphernalia, a gun and $4,700 in cash. The owner pled guilty to state criminal charges. The United States instituted civil forfeiture proceedings against the real property. The owner defended upon the grounds that the forfeiture of his property was so grossly disproportionate to the offense, as to violate the Eighth Amendment excessive fines Clause. The Supreme Court held that a forfeiture of real property is subject to the limitations of the Eighth Amendment.
>
> ...Examining this case through the lens of Austin, and accepting the fact that Emilio Delio used his home for a

> gambling operation in Violation of 18 U.S.C. 1995, **we conclude, under the particular facts of this case, that the forfeiture of his home, of an arguable value of $150,000 is an imposition of a disproportionate penalty**. Id 13 F.3d at 1498. (emphasis added)

The common theme of all these decisions is that the monetary punishment must be in proportion to the wrongdoing. In this case, a mandatory fine of $500,000.00 for possession of 1500 Vicodin ES tablets is disproportionate.

The problem lies with the fixed, mandatory nature of the fine. If the amount of the controlled substance possessed is 28 grams, but less than 30 kilograms, the mandatory fine is $500,000.00. The mandatory fine remains the same whether the accused possesses an ounce (28 grams) or possesses 65.99 pounds (29.99 kilograms) of the controlled substance. The fine should in some way be proportional to the amount of the controlled substance possessed. While a mandatory fine of $500,000.00 may not be excessive for possession of 65.99 pounds of the controlled substance, it is excessive for possession of less than an ounce of the controlled substance. It is an excessive, disproportionate monetary punishment for the possession of less than an ounce of a prescription drug to be the same as possession of 65.99 pounds of the prescription drug.

Aside from being disproportionate, the statute's scheme of mandatory fines is constitutionally irrational, such that it violates the Equal Protection Clauses of the United States and Florida Constitutions. The irrationality is amply demonstrated. First, consider the punishment for the following serious violent crimes which pose a greater threat to the health, safety, and welfare of society. There is no mandatory fine for these offenses: Second Degree Murder, Manslaughter, Sexual Battery, Strong Armed Robbery, Arson,

Aggravated Battery, Aggravated Assault, Vehicular Homicide, DUI Manslaughter, Extortion, Kidnaping, or Discharging a Bomb Resulting in Serious Injury.

Second, the possession of a ton (2000 pounds) of the controlled substance has no mandatory fine. Possession of a ton of the controlled substance subjects the accused to a mandatory life sentence, but no fine. See s. 893.135(1)(c)(2), Fla.Stat. (1995). Is it constitutionally rational for an offender with an ounce of the substance to have a mandatory $5000,000.00 fine, but the offender with a ton of the substance has no mandatory fine?

The absurdity is further amplified by the following outcome which is legally possible. An accused could be charged with possessing a ton (over 30 kilograms) of hydrocodone, which is punishable by a mandatory minimum sentence of life imprisonment, but no mandatory fine. The accused could provide "substantial assistance". The prosecutor could move the sentencing court to reduce or suspend his sentence, and the accused could be placed on probation. The accused would not have to worry about the sentencing court reducing or suspending a mandatory fine because there is none for possessing 30 kilograms or more of hydrocodone. In contrast, an accused could be charged with possession of an ounce (28 grams) of hydrocodone, which subjects him to a mandatory minimum term of imprisonment of 25 years and a mandatory fine of $500,000.00. The accused could provide "substantial assistance." The prosecutor could move the sentencing court to reduce or suspend his sentence. The court could place the accused on probation, but refuse to reduce or suspend the mandatory $500,000.00 fine. This potential outcome comes about because the legislature created a statute which has no

mandatory fine for possession of a ton of the controlled substance, but imposes a mandatory fine of $500,000.00 for possession of an ounce of the controlled substance. This is constitutionally irrational.

The Defendant is facing a mandatory fine of $500,000.00 for possessing 1500 tablets of prescription drugs without a prescription. The legislature's zeal to punish drug offenders has resulted in a statutory scheme of mandatory fines that must be stricken as being both disproportionate and constitutionally irrational. However, the striking of the mandatory fines does not mean the Court cannot fine the Defendant. Given the severability clause, which is standard to all legislation, the Court may fine the Defendant in accordance with s. 775.083, Fla.Stat. (1996), which sets forth the fines for first degree felonies.

Conclusion

The Defendant prays the Court grant the following relief: (1)dismiss Count I and allow the State Attorney to refile the charge as a third degree felony; (2) in the alternative, reduce the charge to the lesser included offense of trafficking in hydrocodone less than 14 grams; (3) or, in the alternative, declare the mandatory term of imprisonment unconstitutional and calculate the applicable sentence for a first degree felony per the sentencing guidelines. Lastly, declare the mandatory fine unconstitutional and apply the statutory fine applicable for a first degree felony.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished the 23rd day of September 1997, to:

John Gallagher, Assistant State Attorney
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Fort Lauderdale, FL 33301

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Edward M. Kay/099769

[X] 17th Judicial Circuit in and for Broward County
[ ] In the County Court in and for Broward County

DIVISION:
[X] CRIMINAL
[ ] TRAFFIC
[ ] OTHER

ORDER

CLOCK IN
Filed In Open Court,
ROBERT E. LOCKWOOD,
CLERK
ON _____
BY _____

THE STATE OF FLORIDA VS.
Stephen Falkenstein
PLAINTIFF DEFENDANT

CASE NUMBER
96987CF10A

CHARGE 1. Trafficking Hydrocodone

DEFENSE MOTION TO Dismiss IS HEREBY granted. FOR REASONS AS STATED ON THE RECORD IN OPEN COURT.

DONE AND ORDERED THIS 24 DAY OF October, 19 97, IN BROWARD COUNTY, FLORIDA

N. Schapiro
JUDGE
Schapiro

COPIES: BSO - SAO

FORM #CC-252
REVISED 10/90

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	:	
Plaintiff/Appellant,	:	Case No. 96-9875 CF10A 96-9875 CF10B
v.	:	Judge SCHAPIRO
STEPHEN FALKENSTEIN, **LISA BROWN,**	: :	
Defendants/Appellees.	:	**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that the State of Florida, Plaintiff/Appellant, appeals to the Fourth District Court of Appeal, State of Florida, the final Orders Granting Defendants' Motions to Dismiss, in the above-styled cause rendered October 24, 1997.

Respectfully submitted,

MICHAEL J. SATZ
State Attorney
17th Judicial Circuit
of Florida

James P. McLane

JAMES P. McLANE
Assistant State Attorney
(Bar No. 354521)
675 Broward County Courthouse
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Telephone: 831-7913
Counsel for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice was furnished by U.S. Mail this 5th day of November, 1997 to H. Dohn Williams, Esquire, P.O. Box 1722, New River Station, Fort Lauderdale, Florida, to Edward Kay, Esquire, 633 S.E. 34d Ave., Ste. 4F, Fort Lauderdale, Florida 33301, to Stephen Falkenstein, Defendant, 6213 Seminole Terr., Margate, Florida 33060 and to Lisa Brown, Defendant, 12013 Royal Palm Bch. Blvd., Coral Springs, Florida 33063.

James P. McClave
OF COUNSEL

STORAGE NAME: h1385s1z.hc
DATE: May 12, 1995

"AS PASSED BY THE LEGISLATURE"
CHAPTER #: 95-415, Laws of Florida

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
HEALTH CARE
FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 1385

RELATING TO: Substitution of Medicinal Drugs

SPONSOR(S): The Committee on Health Care and Representative Peaden

STATUTE(S) AFFECTED: ss. 110.12315, 499.033, 499.0054, and 893.03, F.S.

COMPANION BILL(S): SB 2454 (similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) HEALTH CARE YEAS 23 NAYS 0
(2) APPROPRIATIONS YEAS 36 NAYS 0
(3)
(4)
(5)

I. SUMMARY:

This bill revises statute relating to prescription drugs to allow certain drug products containing ephedrine to be sold over-the-counter. These drug products, like Primatene tablets (which are used to control asthma), are thought to have little potential for abuse. The bill also makes it a violation of Florida's Drug and Cosmetic Act (ch.499, F.S.,) for anyone to advertise or label any product containing ephedrine for any indication not approved by the U.S. Food and Drug Administration.

The bill also amends s. 893.03, F.S., which relates to controlled substances. Under current state law, any drug product which contains a controlled substance is also a controlled substance, except for "Excluded Substances" as defined in 21 C.F.R. s. 1308.22. The federal drug laws permit other exclusions which are not referenced in Florida law. This bill conforms the Florida controlled substances law to the federal law.

Finally, the bill amends s. s.893.135(1)(c)1. to create the offences of trafficking in oxycodone, hydorcodone, hydromorphone, or any salt, isomer, or salt of an isomer of these substances. The bill also amends this subsection to create the offences of traficking in any derivative of oxycodone, hydorcodone, hydromorhhone, opium, morphine, or heroin.

This legislation has no direct fiscal impact.

STANDARD FORM 11/90

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

During the 1994 Session, the Legislature adopted a law (ch. 94-309, L.O.F.) which made ephedrine a prescription drug. This means that any product which contains ephedrine can only be dispensed only by prescription. This law was enacted because of the marketing of, and the growing popularity of, products that were advertised to help the user stay awake (MaxAlert), lose weight (Mini-Thins), or enhance athletic performance (Mega-Trim). Use of ephedrine for these purposes is not approved by the FDA. There was growing concern that the marketing of these products was misleading consumers and was encouraging abuse of ephedrine, especially among teenagers.

However, enactment of ch 94.-309, LOF, resulted in the requirement that asthma sufferers had to obtain a prescription to purchase bronchodialators. These products, such as Primatene tablets, comply with FDA regulations and are manufactured, marketed, and distributed for legitimate medicinal use in a manner that reduces the likelihood of abuse.

Section 893.03, F.S., contains standards and schedules for controlled substances. Controlled substances are drugs that have a great potential for abuse. Included in the drugs listed under this section are morphine, heroin, cannabis, peyote, opium, methadone, and anabolic steroids. Although these drugs have a great potential for abuse, if combined with other drugs, the potential for abuse can be reduced or even eliminated.

Anabolic steroids are a case in point. Athletes use anabolic steroids such as testosterone to enhance muscle development. However, there can be grave side effects from the use of testosterone (thus it was included on the schedule of controlled substances several years ago). However, testosterone is often given in combination with estrogen to post menopausal women. In this combined form, testosterone has almost no potential for abuse as a muscle enhancing drug. The federal government has recognized this fact and has exempted four schedules of drug products from the controlled substances list. Florida statutes recognize only one of these schedules. Thus, many combination drugs which are not listed as controlled substances in federal law are controlled substances in Florida.

Section 893.135(1)(c)1., F.S., provides that a person who knowingly sells, purchases, manufactures, delivers, or brings into Florida, or who is in actual or constructive possession of, 4 or more grams of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits the first degree felony offence of trafficking in illegal drugs. In several recent court cases in Florida, persons avoided conviction under this section for trafficking in semi-synthetic derivatives of opium which are not listed in this statute, including oxycodone, hydrocodone, or hydromorphone.

B. EFFECT OF PROPOSED CHANGES:

Certain products containing ephedrine will be lawfully available as over-the-counter drugs. These products include Primatene tablets, a medication used to treat asthma. Products containing ephedrine, other than those on the exception list, will continue to require a prescription. Anyone who advertises or labels any product containing ephedrine for any indication not approved by the U.S. Food and Drug Administration will be in violation of the Florida Drug and Cosmetic Act.

Certain drug products containing controlled substances will be exempt from regulation as a controlled substance in Florida. All of these drugs are currently exempt from regulation as a controlled substance under federal regulation.

Trafficking in oxycodone, hydrocodone, hydromorphone, or any derivative, salt, isomer or salt of an isomer, or any derivative of opium, morphine, or herion will be prohibited and made a first degree felony.

C. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 499 .033, F.S., 1994 Supplement, to allow certain drug products containing ephedrine to be sold over-the-counter.

Section 2. Amends s. 499.0054, F.S., to make it a violation of the Florida Drug and Cosmetic Act advertising or labeling a product containing ephedrine for any use which is not approved by the FDA.

Section 3. Amends s. 499.057, F.S., to correct a cross reference.

Section 4. Amends s. 893.03, F.S., to conform to federal law the Florida statute which regulates controlled substances. Specifically, the section exempts from regulation as a controlled substance a list of exempted schedules, including "Exempt Chemical Preparations", "Exempt Prescription Products", and Exempt Anabolic Steroids".

Section 5. Amends s. 893.135(1)(c), F.S., to add oxycodone, hydrocodone, hydromorphone, or any derivative, salt, isomer or salt of an isomer, or any derivative of opium, morphine, or herion to the section. The section prohibits trafficking in these substances.

Section 6. Provides an effective date of July 1, 1995.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

Patients will again have access to drug products containing ephedrine for treatment of asthma.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This legislation does not place a mandate on local governments.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This legislation does not reduce the ability of local governments to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This legislation does not reduce state taxes shared with local governments.

V. COMMENTS:

The provisions of section 3 of this act may constitute an unconstitutional delegation of authority to the U.S. Food and Drug Administration. Certain drug products are exempted from regulation as controlled substances in Florida based on federal regulations. If these federal regulations are changed by the FDA, the effect this may have on the regulatory status of these products in Florida is unclear.

Bill History -- HB 1385

3/06/95 H Prefiled.
3/07/95 H Introduced.
3/09/95 H Referred to Health Care.
3/20/95 H Subreferred to Health Standards Subcommittee; On Subcommittee agenda -- Health Standards, 3/22/95, 8:30 am, 217 HOB.
3/22/95 H Subcommittee recommeddation: Favorable.
4/04/95 H On Comittee agenda -- Health Care, 04/05/95, 6:30 pm, Room EL Senate Office Building.
4/06/95 H Comm. Action: CS by Health Care.
4/11/95 H CS read first time on 4/11/95; pending review of CS under Rule 8.4.
4/18/95 H CS additional references Appropriations; Now in Appropriations.
4/24/95 H On Committee agenda-- Appropriations, 4/25/95, 8:00 am Morris Hall.
4/25/95 H Comm. Action: -Favorable with 1 amendment by Appropriations.
4/28/95 H Placed on Calendar.
5/04/95 H Placed on Special Order Calendar; Retained on Regular Calendar.
5/05/95 H Read Second time; Amends adopted; Read third time; CS passed as amended; YEAS 118 NAYS 0.
5/06/95 S Received; Substituted for SB 2454; CS passed; YEAS 37 NAYS 2.
5/06/95 H Ordered enrolled.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute is an entirely different bill from the original bill. A strike everything amendment was adopted in the Full Committee which eliminated the original bill in its entirety and replaced it with the bill analyzed in this staff analysis. The original bill

dealt with substitution of drugs and the statutory creation of a definition of "finished dosage form".

CS/HB 1385 passed the full Appropriations Committee with one amendment. The amendment struck language that amends s. 110.123, F.S., that permits local pharmacies to fill a 90 day prescription for state employees participating in the state employee prescription drug program because of it's fiscal impact.

The bill was amended on the Floor of the House to adopt the Appropriations amendment, to add a technical amendment, and to make the revisions to the bill related to drug trafficking.

VII. SIGNATURES:

COMMITTEE ON HEALTH CARE:

Prepared by:	Staff Director:
Michael P. Hansen	Michael P. Hansen

AS REVISED BY THE COMMITTEE ON APPROPRIATIONS:

Prepared by:	Staff Director:
Cathie Herndon	David K. Coburn

FINAL ANALYSIS PREPARED BY COMMITTEE ON HEALTH CARE:

Prepared by:	Staff Director:
Michael P. Hansen	Michael P. Hansen

STANDARD FORM 11/90

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of January 1999 a copy of the foregoing was furnished by United States Mail to:

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Miami, FL 33133

for Edward M. Kay/099769 #348872

IN THE
SUPREME COURT OF FLORIDA

No. 94,527

STEPHEN FALKENSTEIN,
Petitioner

v.

STATE OF FLORIDA,
Respondent.

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW A DECISION OF THE FOURTH
DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER STEPHEN FALKENSTEIN

Edward M. Kay, Esq.
Fla. Bar No. 099769
Attorney for Petitioner
633 S.E. Third Ave. Ste 4F
Ft. Lauderdale, Fla. 33301

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TABLE OF CITATIONS

ARGUMENT

A. THE TERMS OF F.S. 839.135(1)(C)1 ARE AT LEAST AMBIGUOUS WHEN APPLIED TO HYDROCODONE.

The State argues that the statute applies to all mixtures containing hydrocodone, regardless of the schedule on which the hydrocodone appears. A plain reading of the statute, however, shows that the phrase "as described in s. 893.03(1)(b) or (2)(a)" refers to all of the previously listed substances, including hydrocodone, and not just the phrase "any salt, derivative, isomer, or salt of an isomer thereof", as argued by the State. The two mentioned subsections include the substances previously listed in the statute as well as salts, derivatives and isomers. At the least, the statute can correctly be read as Petitioner asserts. Therefore, there is at least an ambiguity on this issue.

The "mixture" phrase in the statute was already in place in 1995 when the statute was amended to include hydrocodone. The amendment simply added the words oxycodone, hydrocodone, hydromorphone and derivative in the list of substances, and no additions or changes were made regarding the already existing "mixture" language. Therefore, the nature of the amendment does not clear up the ambiguity. As argued previously, the ambiguity must be construed in favor of the accused.

B. THE POSSESSION, SALE, MANUFACTURE AND DELIVERY OF THE AMOUNTS OF HYDROCODONE ALLEGED HERE ARE PROHIBITED BY F.S. 893.13 AND CONSTITUTE A THIRD DEGREE FELONY.

The State appears to argue that unless the trafficking statute is construed to include low concentrations of hydrocodone, its possession will not constitute a crime. F.S. 893.13, however, prohibits the possession, sale, manufacture and delivery of the substances listed in Schedule III. Therefore, the legislature has addressed the issue of possession of the lower concentrations in a different section, and as a lesser felony. It is a crime to possess prescription tablets of low concentrations of hydrocodone. It just is not a first degree felony.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the order of the Fourth District Court of Appeals be reversed and the trial court dismissal be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Barbara Amron Weisberg, Esq. Assistant Attorney General 1655 Palm Beach Lakes Boulevard Suite 300 West Palm Beach, Florida 33401-2299 and Bradley Stark, esq. 2601 South Bayshore Dr. Ste 601, Miami, Fla. 33133 this 14 day of March, 1999.

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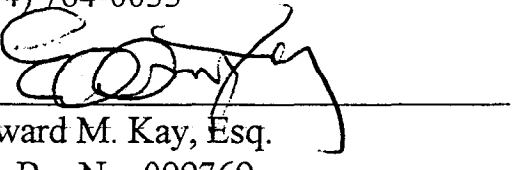

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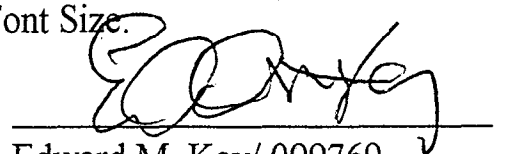

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